

FILED
CLERK

12/30/2013

U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Darryl T. Coggins,	.	Docket #CV-07-3624 (JFB)
	.	
Plaintiffs,	.	
	.	United States Courthouse
V.	.	Central Islip, New York
	.	September 9, 2013
County of Nassau, et al.,	.	2:33 p.m.
	.	
Defendants.	.	
.....	.	

TRANSCRIPT OF ORAL ARGUMENT ON MOTION
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For The Plaintiffs:	Valerie M. Cartright, Esq. Law offices of Frederick K. Brewington 556 Peninsula Blvd. Hempstead, NY 11550
For The Defendants: County of Nassau & Officer James Vara	Diane C. Petillo, Esq. Office of the Nassau County Attorney One West Street Mineola, NY 11501
For The Defendant: Officer Craig Buonora	Laurence J. Weingard, Esq. Law office of Laurence J. Weingard 250 West 57th St.-Ste. 401 New York, NY 10107
	Mitchell F. Senft, Esq. Law office of Laurence J. Weingard 250 West 57th St.-Ste. 401 New York, NY 10107

Audio Operator:

Transcribing Firm:

Writer's Cramp, Inc.
6 Norton Rd.
Monmouth Jct., NJ 08852
732-329-0191

Proceedings recorded by electronic sound recording, transcript
produced by transcription service.

1 THE CLERK: Calling Case, 07-CV-3624, Coggins vs.
2 County of Nassau. Please state your appearance for the
3 record.

4 MS. CARTRIGHT: Valerie Cartright from the law
5 office of Frederick K. Brewington, 556 Peninsula Blvd., 11550,
6 Hempstead, New York. Your Honor, may we remain seated when we
7 speak?

8 THE COURT: Yes.

9 MS. CARTRIGHT: Thank you.

10 MS. PETILLO: Good afternoon, Your Honor, Diane C.
11 Petillo, for the Defendant, County of Nassau and Officer Vara,
12 Nassau County Attorney's office, One West Street, Mineola, New
13 York 11501.

14 MR. WEINGARD: Laurence Jeffrey Weingard, for
15 Defendant Buonora, 250 West 57th St., New York City.

16 MR. SENFT: Mitchell F. Senft, associated with the
17 law office of Laurence Jeffrey Weingard.

18 THE COURT: Okay. Good afternoon, everybody. How's
19 your wife doing, Mr. Weingard, she okay?

20 MR. WEINGARD: Thank you for asking, Judge. We'll
21 know more in October.

22 THE COURT: Good.

23 MR. WEINGARD: But thank you.

24 THE COURT: Sure. As you know, we're here for
25 argument on -- it's actually -- we have very different

1 procedural postures here because the County chose to oppose
2 the Motion to Amend, whereas, Mr. Weingard essentially -- not
3 essentially, did choose to file a Motion to Dismiss and for
4 Summary Judgment against the Amended Complaint. We have two
5 different procedural postures. I don't think it really
6 matters, because I think as we've discussed before, the
7 standard is the same, whether or not it's filed as a Motion to
8 Dismiss or Opposition to a Motion to Amend, the standard is
9 whether or not it could survive a Motion to Dismiss standard,
10 although Mr. Weingard is urging the Court to also view it
11 under the Summary Judgment standard, which we'll discuss.
12 But, in any event, that's the posture that we're in, and I'm
13 going to let the Defendants go first. So, Ms. Petillo, do you
14 want to start, or Mr. Weingard, I don't care who starts.

15 MS. PETILLO: Do you want to start?

16 MR. WEINGARD: Up to you. Judge, do you want us up
17 at the podium?

18 THE COURT: No, you may be seated. It's fine.

19 MS. PETILLO: Your Honor, one of the first issues we
20 have with the Amended Complaint is it makes reference to a
21 conspiracy based on race, arguing that the sole reason that
22 Mr. Coggins was stopped on the night in question was based on
23 his race. However, if you review the Complaint -- or I should
24 say, a review of the Complaint indicates that there was no
25 claim that he's a member of a protected class. There's no

1 reference to he being a member of a protected class. There's
2 just this reference later on in the Complaint; I believe it's
3 paragraph 24, stating that he was stopped "because of his race
4 and color, having committed no violation of law." So under
5 1985, there needs to be some type of a claim that you're in a
6 protected class. There also needs to be allegations of a
7 conspiracy being that there was a conspiracy for purposes of
8 depriving either directly or indirectly equal protection of
9 the laws, and act in furtherance of the conspiracy and some
10 type of injury to the person or property. We know that
11 there's no allegation with respect to he being a member of a
12 protected class. With respect to the conspiracy itself, the
13 first issue with that is that there's no specifics as to the
14 fact that the Defendants agreed that there was any agreement
15 between the Defendants, what was agreed to, what acts they
16 would take in furtherance of that conspiracy -- there's all
17 these vague allegations that, you known, they decided to --
18 the Plaintiff's fourth cause of action alleges that {quote}
19 "Defendant Vara and Defendant Buonora expressly and impliedly
20 agreed with each other to bring about Plaintiff's seizure,
21 arrest, detention, false accusation, all without proper basis
22 or justification on account of Mr. Coggins' race, color, and
23 gender." There's no specifics as to what exactly they agreed
24 to, how they were going to accomplish that, and that aside, at
25 the time of this incident, both Buonora and Vara were members

1 of the Nassau County Police Department. So, based on the fact
2 that they were members of the same Government or corporate
3 entity, there can be no conspiracy on that basis.

4 Also with respect to the 1986 Failure to Intervene, under
5 --

6 THE COURT: I just want to go back to what you said
7 there, because I guess I don't -- the conspiracy -- I mean,
8 they spent pages and pages describing the conspiracy. I guess
9 I don't understand -- this is not -- believe me, I've
10 dismissed many a complaint because of a conclusory allegation
11 of conspiracy, but the conspiracy that they're describing here
12 is a conspiracy to essentially frame Mr. Coggins in terms of
13 the possession of the firearm, where they're alleging that
14 both officers knew that it was not his and that they engaged
15 in a conspiracy to have him arrested and then prosecuted for
16 possession of a weapon that was not his. I mean, that's the
17 conspiracy.

18 MS. PETILLO: And even if we assume that, Your
19 Honor, they're still members of the Nassau County Police
20 Department. They are members of the same entity.

21 THE COURT: I know, but if their allegation is -- I
22 think there's an exception to the Intracorporate Conspiracy
23 Doctrine if it's for personal reasons, and they're alleging in
24 connection with this, that it is because of his race. And I
25 understand you're saying they don't allege --

1 MS. PETILLO: Which they don't allege in the
2 complaint, which is --

3 THE COURT: But they could correct that. I mean
4 that's one sentence if he's -- you'll get your turn, Mr.
5 Weingard. You know, if he's African American -- I don't know
6 what his race is, but whatever it is, that's not a defect that
7 they can't correct, but if the officers did knowingly
8 fabricate evidence in terms of his possession of a gun based
9 upon his race, I'm not sure the Intracorporate Conspiracy
10 Doctrine would protect that type of conspiracy because of that
11 exception. But go ahead.

12 MS. PETILLO: There's also the issue Officer Vara
13 being entitled to absolute immunity based on his testimony
14 before the Grand Jury.

15 THE COURT: I know, but this is really what this
16 whole motion is about, based upon the Supreme Court's
17 decision, and Mr. Weingard obviously is going to address this,
18 too. But, we've already talked somewhat about this issue.
19 They allege all sorts of conduct unrelated to the actual
20 testimony before the Grand Jury, and I want you or Mr.
21 Weingard to point to any language in Rehberg itself or any
22 circuit Court in the United States that has said that that
23 doctrine extends to everything that a police officer does in
24 connection with an arrest and prosecution once he goes into
25 the Grand Jury. What you are inviting me to do is say that if

1 someone perjures themselves in the Grand Jury, then they have
2 absolute immunity, not just for what they did in the Grand
3 Jury, but everything that they did in connection with the
4 case. And that, certainly is not the law, and I think Mr.
5 Weingard realizes that that's not the law, which is why he
6 makes a separate argument in his brief, which is problematic
7 in and of itself, which is that there's not enough evidence to
8 show that they did anything else other than to perjure
9 themselves in the Grand Jury. But is it your position that
10 you have absolute immunity if you falsify police reports -- is
11 it your position that you have absolute immunity for that?

12 MS. PETILLO: No, Your Honor. My position --

13 THE COURT: That's what they're alleging, though.

14 MS. PETILLO: They're also alleging that there was
15 false testimony before the Grand Jury, and my position is --

16 THE COURT: Okay, so --

17 MS. PETILLO: -- that any claims with respect to
18 that testimony before the Grand Jury, those claims Officer
19 Vara has absolute immunity for.

20 THE COURT: I know, but then I don't think they have
21 to divide them up into separate claims. In other words,
22 there's not one claim for Grand Jury testimony. There's a
23 claim for 1983 based upon violation of his civil rights, you
24 know, under several theories. So, if there was a separate
25 claim that said Section 1983 claim based upon Grand Jury

1 testimony, then maybe that particular claim should be
2 dismissed, but the claim is one for an overall violation of
3 his rights in connection with the arrest and the prosecution
4 of his case. So, there's nothing for me to dismiss, based
5 solely on his Grand Jury testimony. The law is that he can't
6 be held liable based upon that testimony, but they're
7 asserting much, much more in this complaint.

8 MS. PETILLO: That was the sum and substance of our
9 arguments with respect to the amendment of the Complaint, Your
10 Honor.

11 THE COURT: Okay. Okay, go ahead Mr. Weingard.

12 MR. WEINGARD: Thank you very much. My
13 understanding of the racial allegations required a more than
14 just summary allegations, conclusory allegations, but must set
15 forth facts which constitute motivation predicated on race. I
16 looked at this rather long and -- well, this rather long
17 Complaint. I see some summary language which says that it's
18 predicated on color, race, and so on, but there is not a
19 single factual allegation in all of the literal pages, 30
20 some-odd pages, which contain factual allegations related to
21 motivation as it relates to why this man was stopped and why
22 he was detained briefly before he ran away. And it seems
23 logical to me, based on Iqbal and various other cases both in
24 this circuit and elsewhere, that in order to prevail on these
25 civil rights claims, you have to have a motivational

1 experience. It has to say in facts, not in conclusions, that
2 there is a motivation predicated on race which would justify a
3 1983 or a 1981, or for that matter, an 85 or 6 claim, and
4 there is not a single reference to a fact as opposed to
5 conclusions, surmise, and so forth. Given the Facial
6 Plausibility Doctrine, I don't understand how anybody can
7 sustain a 1981 and 3 claim, much less a 5 and 6 claim where
8 you cannot at least allege facts, and they've had four chances
9 to do so. I have yet to see a single fact saying that the
10 motivation -- and I'm not going to cover this from everybody's
11 point of view. I'm going to deal purely and simply with my
12 client. There is not a hint of a motivation on the part of my
13 client predicated in race. And that is the standard, as I
14 understand it. Not only the standard, but in order to have
15 facial plausibility, you must allege factual content from
16 which Your Honor can draw an inference that there is that
17 motivation. I went through this Answer yesterday. I was
18 unable to find anything. Perhaps I did it too quickly, or
19 perhaps I did it too slowly, because anyway I did it, I
20 couldn't find it. Yes, they say in all of their multiple
21 counts that this was all predicated on race, but there is not
22 a single fact to show that. They don't show how whites were
23 treated differently than blacks, how Asians were treated
24 differently than blacks, how any other minority group or
25 majority group was treated differently. In and of itself, and

1 based on the Iqbal standards, these claims must fail, and
2 they've had forever within which to figure out what their
3 factual allegations are. Conclusory, yes. Surmise, yes.
4 Facts, zero. Not a fact contained which shows the malevolent
5 motivation required by 1983, 1981, 5, and 6. And if you look
6 at nothing else from the point of view of that, you'll see
7 that they fail in their pleading obligations, predicated on
8 the facial plausibility as opposed to possibility doctrine of
9 Iqbal. If I may turn from that, unless the Court has
10 questions?

11 THE COURT: Well, I might -- I guess they're also
12 entitled to any reasonable inferences that could be drawn from
13 the fact --

14 MR. WEINGARD: I'm so sorry, Judge. I couldn't hear
15 you.

16 THE COURT: I said, they're also entitled to
17 reasonable inferences that could be drawn from the fact, and I
18 guess the question would be if, in fact, they were able to
19 prove everything that they say in the Complaint, which would
20 essentially then establish that your client fabricated
21 evidence to implicate Mr. Coggins in the possession of the
22 weapon and also said to shoot him as he was running, after he
23 says he was being threatened -- what motivation -- what
24 inference should the Court draw from that? What would be the
25 motivation for that if that were all true?

1 MR. WEINGARD: Judge, the problem with it is that
2 there is not a factual allegation that shows its race based or
3 motivated. It may be --

4 THE COURT: Why isn't that plausible? Why isn't it
5 plausible that it was race based at this point?

6 MR. WEINGARD: No, it may be possible, Judge, but it
7 is not plausible, because there are no facts from which you
8 can draw that inference. And incidentally --

9 THE COURT: I know, but we haven't completed
10 discovery, how could we have the facts? They didn't even --

11 MR. WEINGARD: Judge, we have 780 pages of material
12 that has transpired, including a special investigation by the
13 Nassau County Attorney's office, a special investigation
14 conducted by the Nassau County Police Department, and no where
15 --

16 THE COURT: Has you client been deposed?

17 MR. WEINGARD: No.

18 THE COURT: Has Officer Vara been deposed?

19 MR. WEINGARD: No.

20 THE COURT: So, don't you think those would be two
21 important witnesses on what the motivation for this might have
22 been?

23 MR. WEINGARD: Judge, the answer is no. I'll tell
24 you why. Because when the Nassau County Police Department
25 went through this after the Plaintiff's case had been

1 dismissed, after my client had committed perjury, and after my
2 client had pleaded guilty to perjury, because the police
3 department was trying to assess an appropriate level of
4 punishment within their rules and regulations, and they never
5 concluded that this was race based. They never concluded that
6 that was a motivation for what occurred. They concluded that
7 there was a violation of some procedure not to have done those
8 things, but not that it was motivated by race. There has been
9 an extensive amount of discovery in this case. Yes, you can
10 go through more and more and more depositions and yes, we can
11 have still yet another application to amend this Complaint,
12 and yes, all of those things will happen, but what won't
13 happen is that you will find in all of that mess, a single
14 reference to a race-based motivation, and if you look at this
15 Complaint alone, there is none. And turning for a moment to
16 my client having fabricated a weapon or fabricated evidence,
17 that is pure speculation. It is completely false. My client,
18 you will recall, originally said he found the gun, and then he
19 said he did not because that was his perjury. He did not
20 fabricate a gun, and oh, incidentally, that was a 9 mm gun.
21 Next to the car was found still yet another fully loaded
22 magazine of a different caliber. There was not --

23 THE COURT: I know, but Mr. Weingard, you keep --
24 this is the whole problem with this motion at this time. You
25 want to argue as if we're sitting here on Summary Judgment.

1 You want that to be true. But it's not true. We're not on
2 Summary Judgment here. We are still on a Motion to Dismiss
3 stage because, for a number of years, this case has not been
4 allowed to proceed in discovery. So you want me to conclude
5 that, even though they allege that there was a fabrication of
6 evidence in this case -- you just want me to reject that. You
7 want me to reject what they are alleging in the Complaint, and
8 act as if it's not there, and you know I can't do that. You
9 want me to do the same thing when we get to the Rehberg issue.
10 You want me to -- even though they have alleged that your
11 client is involved in the preparation of police reports, you
12 say in your brief, that's false Judge, that never happened,
13 and you know that never happened because discovery to date has
14 not shown that to be true. So, you want to litigate this case
15 as if all the facts are out, but they're not all out.

16 MR. WEINGARD: But they certainly with regard to the
17 latter, they have 850 pages of documents, including 150 of
18 which that they, themselves, submitted, and there is not even
19 a hint of any of those things. Nothing contained within them
20 reflect --

21 THE COURT: They --

22 MR. WEINGARD: -- racial motivation --

23 THE COURT: Okay, okay, let's --

24 MR. WEINGARD: -- or the fabrication of evidence.

25 THE COURT: Well, let's go to the Section 1983 Claim

1 itself, because obviously you don't need a racial component
2 for that. So, what's your response to the questions that I
3 asked Ms. Petillo? Does Rehberg protect your client --

4 MR. WEINGARD: Yes.

5 THE COURT: -- if he was involved --

6 MR. WEINGARD: Oh, I'm sorry Judge, pardon me. The
7 answer is yes, but please, finish. I'm sorry.

8 THE COURT: So, your position is that if your client
9 was involved in the preparation of false police reports that
10 resulted in the detention and malicious prosecution of their
11 client, that Rehberg says he has absolute immunity? That's
12 your position?

13 MR. WEINGARD: No, no. No, no.

14 THE COURT: Okay. See, you answered too quickly.

15 MR. WEINGARD: Quite honestly, I think that that's
16 true, but I'm not going to receive a welcomed response to
17 that.

18 THE COURT: Okay.

19 MR. WEINGARD: So I will lay that aside for the
20 moment.

21 THE COURT: Well, before you lay that aside for a
22 moment, do you -- tell me, when you say you believe that's
23 true, what is that based on? Do you have any case --

24 MR. WEINGARD: He --

25 THE COURT: Does Rehberg itself or any case --

1 MR. WEINGARD: Yes.

2 THE COURT: -- in the United States say that an
3 officer who prepares a false police report --

4 MR. WEINGARD: No.

5 THE COURT: -- has absolute immunity?

6 MR. WEINGARD: No.

7 THE COURT: Okay.

8 MR. WEINGARD: But, when you have 850 documents
9 supplied by the County of Nassau, the Police Department of the
10 County of Nassau, and the special investigation units of both
11 the District Attorney's office and the Police Department of
12 Nassau, there is nothing in those documents to support the
13 fact that he fabricated anything, much less a gun, and as I
14 told you, there is not a hint in the Complaint about the other
15 fully loaded -- what's it called, help me --

16 MR. SENFT: Magazine.

17 MR. WEINGARD: Magazine. Thank you. I needed that.
18 There's not a hint of that. My client -- Judge, let me put it
19 this way, unless my client was Houdini, he came to the scene
20 as a result of Vara's calling for backup. As he arrived on
21 the scene, a chase ensued. Now, I'm not here to defend Vara,
22 and I'm not here to defend what Vara did post chase or post
23 anything else, but I can tell you that my client ran after
24 him, and then headed back to the car where he held the other
25 parties in the car until other persons from the Floral Park

1 Police Department arrived. I believe they were all there
2 together, and my client did nothing with regard to any of
3 those things. At the end of that event, he was discharged to
4 home. He had a sign out at 7 a.m., and that's what he did.
5 The next thing he knows, he's called by the Prosecutor to come
6 to Court and testify. Whatever happened during his perjury,
7 whatever happened in preparation or in a conspiratorial act
8 for his perjury, is insulated an absolutely immune according
9 to Williper (phonetic). And Rehberg goes farther. It says
10 you can't have a conspiracy, you can't use the perjury, and
11 oh, by the way, you can't use his perjury to substantiate any
12 other 1983 or other claim involving initiation or maintenance
13 of the Prosecution. There is none of that in this case.
14 Zero. And look, we can go through more discovery. We'll find
15 the same things. My client has been burdened by the expenses
16 of this litigation. He has been defending for seven years,
17 and nothing is happening. This is a case in -- look, you can
18 hold every other police officer, if you choose, responsible
19 here. That's okay. Perhaps they did things that my client
20 didn't. But there is nothing to suggest he did it. Not a
21 single factual allegation. It was a conclusion that he
22 fabricated {quote} "the gun." {closed quote} Not a hint about
23 the magazine that was laying near the car. Why they don't
24 deal with that is curious to me. But if anybody believes that
25 Mr. Coggins sprang full blown from the brow of Zeus and was a

1 generally innocent man in this case, I'd be surprised. What
2 happened here is what happened here. But for my client's
3 perjury, there would be nothing that would have provoked his
4 involvement in this case. He never signed a document until
5 after the case was dismissed, and that was only in connection
6 with his SIU -- or SIB, I believe it's called in Nassau. Only
7 in connection with his SIB cooperation after his plea -- he
8 didn't -- incidentally, and that he does not say that he
9 yelled, "Just shoot the guy." I'm not even sure of how that
10 differs from "Stop or I'll shoot," but he does not acknowledge
11 doing that. And he had every reason to acknowledge doing
12 that. He didn't want anymore charges. He didn't want anymore
13 problems with the police, and this was what it was.

14 THE COURT: Okay, hold on. Hold on.

15 MR. WEINGARD: Sure.

16 THE COURT: I'm focused on what the allegations in
17 the Complaint are. That's the standard here. You, again --
18 you can tell me as much as you want that there's 850 pages of
19 documents out there, but --

20 MR. WEINGARD: Judge, I'm so sorry. Could you just
21 speak a little louder?

22 THE COURT: Yes. I said I'm focusing on the
23 allegations in the Complaint. That's what I'm looking at.
24 You can tell me as many times as you want that there are 850
25 pages of documents out there, but I'm not persuaded by the

1 number of pages of documents out there, that I should cut the
2 case off simply because there's pages of documents in
3 discovery that have been provided, even though your client
4 hasn't been deposed, Defendant Vara hasn't been deposed, I
5 don't think anybody's been deposed other than maybe one
6 person, if my memory is correct. But -- for example, in
7 paragraphs 34 and 35, it says, "Defendant Vara falsified
8 official documents related to what had transpired on October
9 9th, 2004. He intentionally omitted Defendant Buonora's
10 name." And then in the following paragraph, agrees that they
11 agreed with each other to alter the versions of what happened
12 and to submit false information in the police paperwork. So -
13 -

14 MR. WEINGARD: May I just respond to that, Judge?

15 THE COURT: Yes, explain to me how in the Complaint
16 it alleges that your client was involved in the preparation of
17 false paperwork, that I should ignore that allegation?

18 MR. WEINGARD: Because there's no basis in fact for
19 it, and under Iqbal, you have to have more than a conclusory
20 result. What you're dealing with here is the conclusory
21 allegation in which they are hopeful that they can show that.

22 THE COURT: Okay, how about paragraph 47 -- no wait,
23 hold on. That's the wrong number.

24 (Pause in proceedings)

25 THE COURT: Paragraph 77, October 9th --

1 MR. WEINGARD: I'm sorry, paragraph 77?

2 THE COURT: Yeah, October 9th, 2004, "Detective
3 Buonora prepared a report documenting his interactions with
4 Defendant Vara as they related to this case." Is that --

5 MR. WEINGARD: May I just have a moment to --

6 THE COURT: Sure --

7 MR. WEINGARD: -- see it please? That's a mistake.
8 If you're looking at 77, it's on October 9th, Detective Barish
9 (phonetic) prepared a report. Barish is the detective -- it
10 was a typo.

11 THE COURT: That's a typo?

12 MR. WEINGARD: Typo.

13 THE COURT: Okay.

14 MR. WEINGARD: And if you look at the context in
15 which it finishes up, you'll see it deals with Vara and
16 Barish.

17 MR. SENFT: Barnish (phonetic).

18 MR. WEINGARD: What does it say?

19 MR. SENFT: Barnish.

20 MR. WEINGARD: Barnish, I'm sorry. There is a --
21 Judge, I'm telling you, it's devoid of a factual allegation --

22 THE COURT: Well, that -- I guess we --

23 MR. WEINGARD: -- not a one.

24 THE COURT: -- have a different definition of what a
25 factual allegation is.

1 MR. WEINGARD: All right, Judge.

2 THE COURT: I think when someone alleges that there
3 was a conspiracy to fabricate that he had the gun, that false
4 police reports were prepared, and that your client, even if he
5 didn't author the false police reports, was involved in their
6 preparation, knew that they were being submitted, failed to
7 intervene, even though he knew, according to them, that the
8 facts that Vara were submitting in those reports were wrong
9 and that he was intentionally left out of the reports. That's
10 what they're alleging.

11 MR. WEINGARD: Judge, they are alleging that. But
12 there is no factual substance for that allegation, and if I
13 may, Judge, please?

14 THE COURT: They don't -- that's what an allegation
15 is. An allegation is -- it's not --

16 MR. WEINGARD: Yes, but --

17 THE COURT: -- the question of whether there's
18 evidence to support, the question is whether or not it is
19 detailed enough for you to have notice as to what they are
20 claiming. You can't have much more of a detailed explanation
21 other than to say, this report, that report, but -- in fact,
22 in the brief I think they do actually put particular dates on
23 some of the reports, but it's not -- you're just saying they
24 don't have evidence to support that. It's not a pleading
25 problem. You're just saying they don't have evidence, that

1 they're not going to be able to prove that.

2 MR. WEINGARD: No, I'm saying -- well first, they're
3 not going to be able to, because it doesn't exist, but first
4 I'm saying that under Iqbal if I may read, "A claim has facial
5 plausibility when the Plaintiff pleads factual content that
6 allows the Court to draw the reasonable inference that the
7 Defendant is liable for the misconduct alleged." There is no
8 factual content. It doesn't exist in this Complaint. You can
9 go through this Complaint until the cows come home, and when
10 you look at things like the motivational reason based on race,
11 it doesn't exist. If you look at the facial plausibility
12 issue that I just addressed, there is not a single factual
13 assertion -- a factual assertion and pleading which allows the
14 Court to draw a reasonable inference. I mean, Judge, please
15 forgive this observation, but Iqbal is the case that keeps on
16 giving. I mean, it's a case in which the Court was looking at
17 what do you do with these types of 1983 allegations when it
18 involves serious charges against serious people with serious
19 governmental obligations, and how do you test it? And the
20 answer is, you test it by looking at the factual allegations
21 from which you can draw conclusions that there is facial
22 plausibility, none of which exist here. Not a -- Judge, you
23 can look through that Complaint until the cows come home. You
24 won't find them. I was with it for four hours yesterday.
25 Looking as hard as I could, I couldn't find them.

1 THE COURT: Why wouldn't it be a reasonable
2 inference if Defendant Vara was going to put false information
3 in his report that you would have to discuss that with your
4 client as well before he put it in the report? Why isn't that
5 a reasonable inference to be drawn that if, in fact, Vara was
6 creating false police reports, that he would have consulted
7 with your client --

8 MR. WEINGARD: But that's surmise, Judge. You're
9 making --

10 THE COURT: Why is that surmise?

11 MR. WEINGARD: Sure it is. There isn't a factual
12 allegation -- here -- they don't say that they met on such and
13 such a day. They don't say that they had a conversation while
14 having coffee at the local diner. They don't give you any
15 factual basis from which you conclude under the Iqbal facial
16 plausibility standard that it exists.

17 THE COURT: How about a (indiscern.) theory? Why
18 wouldn't your client be responsible --

19 MR. WEINGARD: Because he didn't -- okay, this is a
20 beauty. He didn't even know that there had been a prosecution
21 started. The client -- he went home, he went about his
22 business after the chase, and when he was next contacted by
23 anybody, it was to go to the Grand Jury and testify.

24 THE COURT: Where is that in the Complaint?

25 MR. WEINGARD: It -- where is that in the Complaint?

1 THE COURT: Yes.

2 MR. WEINGARD: It's not in the Complaint.

3 THE COURT: Well then how can I consider that?

4 Again, you're asking me to consider facts that aren't even in
5 the Complaint.

6 MR. WEINGARD: No, I'm telling you that they can't
7 allege facts that are -- their Complaint is devoid of the fact
8 that says they met on such and such a day. They spoke on such
9 a -- there's not even an indication that they spoke on a
10 particular day. There is nothing which suggests any of that.
11 Nothing. And so it comes down to mere speculation or a
12 conclusion from which this Court cannot draw a facially
13 plausible conclusion that the Complaint should be sustained.

14 THE COURT: So when did your client learn Mr.
15 Coggins was in jail?

16 MR. WEINGARD: I don't think he ever learned it.
17 And I'll tell you -- I will say this to the best of my
18 knowledge, he never -- remember, jail was 2 days. He -- you
19 know what everybody's forgetting about this case? Coggins was
20 a fugitive. Coggins ran away and then went home, apparently,
21 according to his papers, spoke to his mother or father, and
22 then hired a lawyer who then surrendered him. He -- now, my
23 client was there for none of this. He participated in none of
24 it. There was no allegation that he participates in any of
25 it, predicated on any fact whatsoever. Yes, Vara's in a

1 different position. The two detectives are on different
2 positions, because the surrender was made to the detectives,
3 and the detectives took control, and the detectives spoke to
4 Vara. That is a factual allegation. That is something in
5 which they garner some information, and it holds against Vara.
6 But with regard to Buonora, there are no factual allegations.
7 Just to remind you, Coggins spent two days in jail and was
8 bailed out. Look Judge, but for the fact of my client's
9 perjury, he would not be here. He was the touchstone under
10 the old law in this circuit for making this case. That law
11 has been changed. Rehberg gives him absolute immunity with
12 regard to any claim -- any 1983 claim. It gives him
13 conspiratorial immunity. How do you sustain the 1985 claim?
14 How do you then conclude that 1895 should also be sustained?
15 My client wasn't there, as against Buonora, this case is
16 dimensionally different from the case against everyone else.
17 I don't know whether or not the Complaint is sufficient to
18 Vara, because I wasn't studying it from that point of view,
19 but I want to tell you that I sense it may be sufficient if
20 he's not entitled to absolute immunity. But it is not
21 sufficient, not by the facial plausibility standard of Iqbal
22 against Buonora.

23 THE COURT: Okay. Okay. Thank you. Go ahead, Ms.
24 Amsterdam.

25 MR. WEINGARD: I'm so sorry, Judge, I couldn't hear

1 you.

2 THE COURT: I was going to let Ms. Amsterdam go,
3 okay?

4 MR. WEINGARD: Of course.

5 MS. CARTRIGHT: Ms. Cartright.

6 THE COURT: Go ahead.

7 MS. CARTRIGHT: You said --

8 THE COURT: I called you Ms. Amsterdam. I know a
9 Valerie Amsterdam who is a defense lawyer you may have heard
10 of -- I'm sorry -- Ms. Cartright.

11 MS. CARTRIGHT: No problem, Your Honor. Okay, with
12 respect to the arguments made by Ms. Petillo, and I believe
13 Mr. Weingard touched on it also with respect to our 1981
14 claim, Your Honor, it is our position that race was a
15 motivating factor, if not the motivating factor, at least a
16 motivating factor, which is sufficient under Section 1981.
17 There may be, and I was just trying to go through the
18 Complaint to see if we failed to possibly indicate that he is
19 an African American male, but that is his racial background,
20 and it is our position that the initial stop and the manner in
21 which he was treated, and then the subsequent interactions
22 with him as far as charging him falsely, and then of course,
23 moving towards the Grand Jury all -- the race played a part in
24 all of that, Your Honor.

25 THE COURT: Well, they're suggesting that's just a

1 conclusory allegation, that there's no evidence to support
2 that. What's your response to that?

3 MS. CARTRIGHT: Your Honor, our position is that
4 throughout discovery, we will be able to indicate and show
5 that there is actually a pattern in practice in the County of
6 stopping African American males with no real basis, and then
7 fabricating documents, not properly investigating those
8 claims, once it is an African American male who is being
9 charged, and not following through and following the proper
10 procedures as it relates to African American males. That is -
11 - we can only allege what we can allege prior to discovery,
12 Your Honor. It is our position and our belief that with
13 further discovery, we will be able to support our position.

14 THE COURT: Okay.

15 MS. CARTRIGHT: Your Honor, as it relates to the
16 Intracorporate Conspiracy Doctrine, it is our position that
17 all the Defendants engaged in conspiracy as it relates to
18 falsely detaining, falsely arresting, maliciously prosecuting
19 Mr. Coggins. The way we believe the Intracorporate Conspiracy
20 Doctrine is defeated is based on the fact that the individual
21 officers were acting with personal motives. They were acting
22 outside of their capacity, and it satisfies one of the
23 exceptions, Your Honor. So that is our position with respect
24 to the conspiracy. Of course, Section 1986 deals with the
25 failure to intervene, which is why we brought that matter also

1 -- that claim.

2 Your Honor, as it relates to the arguments made by Mr.
3 Weingard, most of his arguments are based on the fact that we
4 don't have enough information. And that was our point
5 initially in our response. The same arguments that we made in
6 response to the first Motion to Dismiss, last Summary Judgment
7 made by Mr. Weingard, his Motion for Summary Judgment was
8 premature.

9 As it relates to the Motion to Dismiss, we believe that
10 it is facially sufficient with this opportunity that the Court
11 gave us to amend the Complaint another time -- we did
12 everything that we could to make sure that we indicated as
13 much facts as possible to satisfy the Iqbal standard. And
14 after reviewing the Complaint a number of times, we believe
15 that it does satisfy that standard.

16 As it relates to Summary Judgment, Your Honor, we do
17 believe again, that it is premature. We have not deposed the
18 two key people here, which is our opinion, the two key people,
19 Vara and Buonora, who are named Defendants in this action, and
20 have not yet been deposed. We do not contest the fact that
21 there were certain discovery materials that was -- you know,
22 provided amongst the parties, which does not include Officer
23 Buonora, given the fact that discovery was stayed as it
24 relates to Buonora. But as it relates to the County, we did
25 have some discovery exchange. However, Your Honor, due to the

1 fact that discovery was stayed in totality again at some point
2 in time because of the motion practice by Defendant Buonora,
3 it was -- we have not moved forward with discovery. So, if in
4 fact, Plaintiff had concerns related to the sufficiency of the
5 responses to our discovery demands, those have not been dealt
6 with.

7 As it relates to any Internal Affairs investigation, Your
8 Honor, the Plaintiff is not required to rely upon the Internal
9 Affairs investigation. That is what discovery is for.
10 Internal Affairs investigation reports is just a part of
11 discovery which aids us in determining the other facts that
12 can assist our case. We, of course, and we've wrote a letter
13 to the Court most recently, asking that discovery be lifted so
14 we can move forward in this matter, and we believe that the
15 Summary Judgment portion is, of course, premature.

16 Your Honor, as it relates to the reply affirmation that
17 was provided by Mr. Weingard, he attached additional
18 documentation -- I believe some transcripts. We ask that
19 those documents not be considered, given that it was submitted
20 on reply, and it did not provide the Plaintiff an opportunity
21 to properly respond to those documents, as well as any new
22 arguments that were placed in the reply.

23 Your Honor, we believe that we have, with this new
24 Complaint, satisfied the pleading standard, and we ask that we
25 are allowed to continue with discovery in this matter against

1 all Defendants, and that the Defendants' motions be denied in
2 its entirety.

3 THE COURT: Okay. Thank you. I'll give you both a
4 chance to briefly respond if you wish to. Ms. Petillo?

5 MR. WEINGARD: May I do this first? Judge, I'm
6 going to go first if it's okay with you?

7 THE COURT: Sure.

8 MR. WEINGARD: I don't understand the notion that
9 with discovery, Mr. Brewington's office is going to learn of
10 racial stops and convictions which in some way create a
11 motivational basis to prove that this is a race-based event.
12 It is my understanding that Mr. Brewington's office does this
13 every day of the week, and it's not in the Complaint. If they
14 know of things like this, why wouldn't they have pleaded this
15 in the Proposed Amended Complaint or in any other Complaint.
16 We're on Complaint four if you grant permission to receive the
17 Complaint. There is nothing, nothing like this in any of the
18 allegations, and they are numerous, and they do not cover
19 Buonora in any way other than in a conclusory way, and based
20 on surmise and so forth.

21 THE COURT: Let me just -- through all the
22 paragraphs in the Complaint I was looking for before -- I
23 couldn't find, Mr. Weingard, paragraphs 51 and 52 --

24 MR. WEINGARD: May I get there, Judge? Give me a
25 moment?

1 THE COURT: Sure. Fifty-one alleges that even
2 before -- that there were three different meetings with the
3 District Attorney's office where he falsely represented to the
4 ADA that he had found a weapon, and then the following
5 paragraph says from the time that he met with the District
6 Attorney's office up until the Grand Jury testimony, he was
7 aware of the fact that the documents had been prepared
8 relating to the detention, arrest, and prosecution of
9 Plaintiff contained false information and omitted important
10 and relevant information, and that despite this knowledge, he
11 did not refute this evidence in any of the reports. So,
12 again, you said before that there's no allegation that he knew
13 that the Defendant had been arrested and was being prosecuted
14 prior to stepping into the Grand Jury but they --

15 MR. WEINGARD: No, no. I didn't say stepping to the
16 Grand Jury, Your Honor. I said until he was contacted by the
17 District Attorney, and if I did say stepping in, I apologize.

18 THE COURT: Okay. Well, no -- you didn't say that,
19 but guess I misunderstood --

20 MR. WEINGARD: He was contacted by the --

21 THE COURT: So again, if he has meetings with the
22 District Attorney's office and becomes aware that false
23 information is contained in police reports, that someone is
24 being detained and prosecuted based upon false information in
25 police reports, why wouldn't there be a failure to intervene

1 theory that he didn't tell his supervisors, he didn't tell
2 anybody, that he knew that the information was false? Why --
3 I don't understand --

4 MR. WEINGARD: First of all, Your Honor, if you take
5 a look at 52, that is not alleged as are the charges all the
6 way through, except upon information and belief. This is
7 surmise. What they're saying is that he must have had
8 conversations concerning police reports. My client did not.
9 What he had was conversations with the District Attorney and
10 the District Attorney asked him questions to which he
11 responded. He prepared no police reports for review, and
12 there were none for him to review, as I understand the facts.

13 THE COURT: Okay. Okay, thank you. Ms. Petillo, is
14 there anything you want to add?

15 MS. PETILLO: At this time, Your Honor, the only
16 thing I would like to add is that there are no allegations of
17 any other claims where any other individuals are alleging to
18 have been differently treated because of their race by the
19 County of Nassau, and the Plaintiff's argument that they be
20 permitted to have discovery to flush out their Complaint, I
21 think is incorrect. What we're talking about is whether or
22 not there was enough on the pleadings themselves to make out a
23 claim. And just a general statement that this is something
24 Nassau County does all the time without pleading other
25 instances where things were done so as to put Nassau County on

1 notice or to show that there is some type of a policy or
2 practice in place, I think is improper at this time. You
3 cannot use discovery as a way to buttress your Complaint. The
4 Complaint needs to stand alone, on its own, with respect to
5 the facts alleged in it. And there's no facts alleged that
6 would show that he was treating any differently than any other
7 individual of his race or color or any other individual of any
8 other minority or class, period. Just the fact that he's
9 alleging, well, this is what happened to him, so therefore he
10 must have been treated differently because of his race, I
11 think is totally incorrect.

12 THE COURT: Okay.

13 MR. WEINGARD: Judge, I join in that observation.
14 It was what I think I was saying to you before, and I think
15 it's crucial under Iqbal and the facial plausibility. Judge,
16 before we go, there is one other thing we have to discuss with
17 the Court.

18 THE COURT: Okay.

19 MR. WEINGARD: You were -- I assume you were in
20 receipt of a letter from Mr. Brewington's office?

21 THE COURT: Yes, I was going to discuss that now.

22 MR. WEINGARD: Shall we?

23 THE COURT: Yes. I guess Ms. Cartright, this
24 appears to be a request that I lift the Stay of Discovery in
25 light of this transcript that's quoted. Is that --

1 MS. CARTRIGHT: That is correct, Your Honor. And
2 some of the excerpts of the transcript was cited to show that
3 we do believe that the Defendants in this action had
4 communication, and the same things that we've been discussing
5 for the past 20 minutes, that the Defendants have engaged in
6 conspiracy outside of just the perjury, but discussions that
7 may have been had with the District Attorney's office leading
8 up to any Grand Jury testimony. And this is our position that
9 continued discovery would help us sift through exactly what
10 factually occurred here, Your Honor.

11 THE COURT: Okay.

12 MS. CARTRIGHT: And if I may one moment, just
13 respond to the statements by both Ms. Petillo and Mr. Weingard
14 with respect to Plaintiff not flushing out the County's
15 pattern and practice of pulling over African Americans and
16 treating them differently, we have paragraphs 133 to 141 which
17 speak specifically to just the manner in which the County of
18 Nassau has conducted themselves in the past. It is our Monell
19 claim, Your Honor. So it is our position again, that we plead
20 that properly.

21 MS. PETILLO: Your Honor, that is just simply that
22 the allegations as what they're alleging they believe Nassau
23 County did wrong. There was nothing saying that there have
24 been other cases in which Nassau County did all these things
25 wrong, and I think that's an important distinction. They're

1 saying well, in this case, you know, we believe that Nassau
2 County did this, this, this, this, and this wrong, therefore
3 there's a Monell issue, and there's nothing to say that in any
4 other cases that there were any of these things did wrong,
5 thereby putting Nassau County on notice as to a Monell issue.

6 THE COURT: Okay. Mr. Weingard, do you want to
7 address that September 6th letter?

8 MR. WEINGARD: Yes, Judge. First, this came to us
9 mid-morning on the second day of the Jewish holiday. We
10 haven't had a real opportunity to respond. I understand we
11 have until tomorrow to do so. I'd ask you until the end of
12 the week so that we may respond to that.

13 THE COURT: I don't know that you need to respond,
14 because I guess, to the extent that it's asking you to revisit
15 my Stay of the Discovery, giving the briefing on this motion,
16 I'm not going to alter that ruling. I don't think -- I
17 understand why the letter was written to me, but for all the
18 reasons that I previously stated, that the law is very
19 favorable to Defendants and Mr. Buonora's decision -- excuse
20 me, Mr. Buonora's position that they should not have the
21 burden of going through a discovery, and given that this has
22 been fully briefed, and I anticipate a decision in the next 60
23 days, if not sooner, with respect to the motions. I'm not
24 going to lift the stay at this point. I was a little confused
25 by the last sentence that talks about an amended briefing

1 schedule. That -- I didn't understand -- that that meant -- I
2 didn't see this as a request for any motion other than a
3 Motion to Lift the Stay, right?

4 MS. CARTRIGHT: That was what it was, Your Honor.

5 THE COURT: Okay. So, I'm not going to do that at
6 this point. We've had oral argument. As I said, I'm hoping
7 to decide this in the near future, and then obviously,
8 depending on the Court's decision, then the discovery issue
9 will be resolved, one way or the other, okay?

10 MS. CARTRIGHT: Okay. Thank you, Your Honor.

11 THE COURT: Okay. Thank you for coming in. Have a
12 good day.

13 MR. WEINGARD: Thank you, very much, Judge.

14 MS. PETILLO: Thank you, Your Honor.

15 (Court adjourned)

16

17

CERTIFICATION

18 I certify that the foregoing is a correct transcript from the
19 electronic sound recording of the proceedings in the above-
20 entitled matter.

21

22

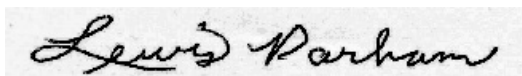
23

24

25

26

27



12/30/13

Signature of Transcriber

Date